# Universal Health Care (R & D) Sdn Bhd (previously known as Health Care Sdn Bhd) v Ramli bin Md Saleh & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-570–04 OF 2020
RAVINTHRAN, MARIANA YAHYA AND LIM CHONG FONG JJCA
10 MAY 2025

*Companies and Corporations — Directors — Fraud on creditors — Recovery of sums due under consent judgment — Appellant's claim against respondents for fraudulent trading and tort of conspiracy to defraud dismissed by High Court — Whether delay in grounds of judgment resulted it being inadequate and ought to be disregarded — Whether liability for fraudulent trading to defraud appellant by fourth respondent had been established under s 304 of Companies Act 1965 — Whether fourth respondent was shadow director — Companies Act 1965 s 304*

This was an appeal against the decision of the High Court judge ('HCJ') in dismissing the appellant's claim against the first to third respondents ie the former directors of Pandan Indah Medical Management Sdn Bhd ('PIMM') and the fourth respondent ie Talam Transform Bhd ('TALAM'), to recover the sums due under the consent judgment against the first to third respondents by making them personally liable for the debt, pursuant to s 304 of the Companies Act 1965 ('the CA') and under the tort of conspiracy to defraud. PIMM was a wholly owned subsidiary of TALAM. On or around 16 June 2000, the appellant entered into a tenancy agreement as a tenant with PIMM as the landlord for the rental of a property known as the Talam Medical Centre in Selangor ('the property') which was constructed on a piece of land ('the land'). In September 2001, PIMM terminated the tenancy as the appellant failed to increase its paid-up capital to RM3m and to furnish a further advance payment of three months' rental by way of a bank guarantee. Subsequently, the appellant on or around 17 June 2002 issued proceedings against PIMM for wrongful termination of the tenancy. However, on 16 January 2009, the appellant and PIMM entered a consent judgment whereby the appellant's claim was allowed and PIMM agreed to pay the appellant. Meanwhile on 4 January 2005, the Securities Commission approved the fourth respondent's proposal to raise funds via issuance of *sukuk ijarah* of RM150m ('sukuk'). PIMM's financial statements for the year ending 31 January 2005 stated that certain subsidiaries of TALAM (including PIMM) and Intelbest Sdn Bhd ('sellers'), entered into a series of agreements with Ample Zone Bhd ('AZB'), who would implement the *sukuk* ie structured asset securitisation programme. AZB would purchase various assets from the sellers to finance the acquisition by the *sukuk* issuance of RM150m. Thereafter, on or around 19 April 2007, PIMM had entered into a

sale and purchase agreement with Hospital Pantai Indah Sdn Bhd ('HPISB') to dispose of the land together with the property to HPISB for a consideration sum of RM63.5m. On 29 May 2014, PIMM was wound up by the court. Ultimately, the appellant contended that the consent judgment was entered by fraud, alleging that the consent judgment was entered by PIMM when PIMM was not in a financial position to honour any part of the consent judgment, and the PIMM directors, including the fourth respondent, knew of this fact. Further, the appellant alleged that the then directors of PIMM, including the fourth respondent, entered into the consent judgment with no intention of honouring the consent judgment or any part of it. It was the appellant's pleaded case that the fraud was orchestrated by the fourth respondent to benefit itself with the connivance of the first, second and/or third respondents. The HCJ dismissed the appellant's claim on the ground that the appellant, on the balance of probabilities, had failed to prove their claim under s 304 of the CA and torts of conspiracy to defraud against all the respondents. Hence, this appeal. The appellant had also raised a preliminary issue in respect of the grounds of judgment issued by the HCJ as follows: (a) a three and a half year delay in issuing the grounds of judgment after the decision was given; and (b) an inadequacy of reasons put forth by the HCJ in relation to material issues.

**Held**, dismissing the appeal:

(1) There was a delay in issuing the grounds of judgment from the HCJ. However, this was not the sole ground for the court to disregard the entire judgment and order for retrial. The HCJ had identified the material issues raised by the appellant and the main issues determinative of the case. In doing so, the HCJ further explained the basis of her reasoning. To say that there were insufficient grounds in the HCJ's grounds of judgment was misplaced (see paras 37 & 40).

(2) AZB had conveyed the beneficial interest in the assets to the *sukuk* trustee, who held it in trust for the *sukuk holders*. Therefore, the ultimate beneficial owners of the assets, including the property, were the *sukuk holders*. Only the *sukuk holders* had the right to sell the property under the *sukuk*. Neither PIMM nor the fourth respondent had the right to do so, and the property could not have been sold without the *sukuk* holders' approval. The fourth respondent did not orchestrate the sale and neither was the disposal of the property carried out with intent to defraud the appellant or PIMM's creditors. The HCJ was right in rejecting the appellant's allegations and found for a fact that the sale was controlled by, inter alia, Malaysian Trustees Bhd as the property was under the *sukuk*. On the allegations of conspiracy to defraud and fraud by the fourth respondent, the appellant failed to prove a wilful act by all the respondents to deprive the appellant of the amount under the consent judgment. The failure of the appellant to plead any agreement nor the particulars of the agreement and failure to plead with clarity of the alleged

over acts of each of the respondents in committing the alleged conspiracy in pursuance of their agreement proved fatal to the said allegation. Additionally, SP3's admission that the defraud act did not occur as alleged had completely demolished the appellant's claim of fraud. Such an admission of SP3, the element of conspiracy to defraud and/or the fraudulent act by the fourth respondent, also fell. Therefore, the appellant's case under s 304 of the CA failed as correctly held by the HCJ (see paras 55–58, 61, 63 & 67).

(3) Regarding the appellant's contention that PPIM never recognised the debt under the consent judgment in its financial statements, the non-disclosure of the consent judgment did not in any way deprive the appellant of its rights to claim for its judgment sum and neither did it show any inference of intend to defraud the appellant. There was no proof of the act of dishonesty on the part of PIMM's directors and the fourth respondent based on the following grounds: (a) the proceeds from the disposal of the property in 2007 did not belong to PIMM and as such, PIMM did not advance the proceeds from the disposal of the property in 2007 to the fourth respondent and its other subsidiaries; (b) the waiver of the waived debts, which was part of an internal settlement exercise, did not appear to be unable to pay and debt waivers were not uncommon, especially between holding companies and their subsidiaries and between fellow subsidiaries and related companies; and (c) no cogent evidence to support SP2's conclusion that the first respondent to third respondent, including fourth respondent, had and dishonestly with intent to defraud or acted for a fraudulent purpose (see paras 72 & 87).

(4) The evidence did not support the appellant's allegation that the fourth respondent was the shadow director of PIMM. The appellant failed to establish that the then directors of PIMM in 2007 were accustomed to act in accordance with the directions or instructions of the fourth respondent when selling the property. The appellant's allegation that the fourth respondent was the 'shadow director' was baseless, misconceived, misplaced, without any foundation and based on erroneous assumptions and deductions. In the absence of evidence of conspiracy proved by the appellant, the appellant's claim of fraud automatically failed. Therefore, the HCJ made no error in finding that the appellant failed on balance of probabilities to prove that the respondents had acted dishonestly or committed the act of conspiracy to defraud the appellant (see paras 89 & 91–93).

**[Bahasa Malaysia summary**

Ini adalah rayuan terhadap keputusan hakim Mahkamah Tinggi ('HMT') yang menolak tuntutan perayu terhadap responden pertama hingga ketiga iaitu bekas pengarah Pandan Indah Medical Management Sdn Bhd ('PIMM') dan responden keempat iaitu Talam Transform Bhd ('TALAM'), untuk

mendapatkan semula jumlah yang terhutang di bawah penghakiman persetujuan terhadap responden pertama hingga ketiga dengan menjadikan mereka bertanggungjawab secara peribadi ke atas hutang tersebut, menurut s 304 Akta Syarikat 1965 ('AS') dan di bawah tort konspirasi untuk menipu. PIMM adalah anak syarikat milik penuh TALAM. Pada atau sekitar 16 Jun 2000, perayu telah memasuki perjanjian penyewaan sebagai penyewa dengan PIMM sebagai tuan tanah untuk penyewaan hartanah yang dikenali sebagai Talam Medical Centre di Selangor ('hartanah') yang dibina di atas sebidang tanah ('tanah'). Pada September 2001, PIMM menamatkan penyewaan tersebut kerana perayu gagal meningkatkan modal berbayarnya kepada RM3 juta dan untuk mengemukakan bayaran pendahuluan selanjutnya sebanyak tiga bulan sewa melalui jaminan bank. Kemudian, perayu pada atau sekitar 17 Jun 2002 memfailkan prosiding terhadap PIMM untuk penamatan penyewaan yang salah. Walau bagaimanapun, pada 16 Januari 2009, perayu dan PIMM telah memasuki penghakiman persetujuan yang mana tuntutan perayu telah dibenarkan dan PIMM bersetuju untuk membayar perayu. Sementara itu, pada 4 Januari 2005, Suruhanjaya Sekuriti meluluskan cadangan responden keempat untuk mengumpul dana melalui penerbitan *sukuk ijarah* sebanyak RM150 juta ('sukuk'). Penyata kewangan PIMM bagi tahun berakhir 31 Januari 2005 menyatakan bahawa anak syarikat tertentu TALAM (termasuk PIMM) dan Intelbest Sdn Bhd ('penjual'), telah memasuki beberapa siri perjanjian dengan Ample Zone Bhd ('AZB'), yang akan melaksanakan *sukuk* iaitu program pensekuritian aset berstruktur. AZB akan membeli pelbagai aset daripada penjual untuk membiayai pemerolehan melalui penerbitan *sukuk* sebanyak RM150 juta. Selepas itu, pada atau sekitar 19 April 2007, PIMM telah memasuki perjanjian jual beli dengan Hospital Pantai Indah Sdn Bhd ('HPISB') untuk melupuskan tanah itu bersama-sama dengan hartanah itu kepada HPISB dengan jumlah balasan sebanyak RM63.5 juta. Pada 29 Mei 2014, PIMM telah digulungkan oleh mahkamah. Akhirnya, perayu berhujah bahawa penghakiman persetujuan itu dimasukkan dengan penipuan dan bahawa penghakiman persetujuan itu dimasukkan oleh PIMM apabila PIMM tidak berada dalam kedudukan kewangan untuk menghormati mana-mana bahagian penghakiman persetujuan itu, dan pengarah PIMM, termasuk responden keempat, mengetahui fakta ini. Selanjutnya, perayu mendakwa bahawa pengarah PIMM ketika itu, termasuk responden keempat, telah memasuki penghakiman persetujuan itu tanpa niat untuk menghormati penghakiman persetujuan itu atau mana-mana bahagian daripadanya. Kes perayu yang diplidkan ialah penipuan itu didalangi oleh responden keempat untuk memberi manfaat kepada dirinya sendiri dengan pakatan responden pertama, kedua dan/atau ketiga. HMT menolak tuntutan perayu atas alasan bahawa perayu, berdasarkan imbangan kebarangkalian, telah gagal membuktikan tuntutan mereka di bawah s 304 AS dan tort konspirasi untuk menipu terhadap semua responden. Oleh itu, rayuan ini. Perayu juga telah membangkitkan isu awal berhubung dengan alasan penghakiman yang dikeluarkan oleh HMT seperti berikut: (a) kelewatan selama tiga setengah

tahun dalam mengeluarkan alasan penghakiman selepas keputusan diberikan; dan (b) kekurangan alasan yang dikemukakan oleh HMT berhubung dengan isu material.

**Diputuskan**, menolak rayuan:

(1) Terdapat kelewatan dalam mengeluarkan alasan penghakiman daripada HMT. Walau bagaimanapun, ini bukan satu-satunya alasan bagi mahkamah untuk mengetepikan keseluruhan penghakiman dan perintah untuk perbicaraan semula. HMT telah mengenal pasti isu material yang dibangkitkan oleh perayu dan isu utama yang menentukan kes itu. Dalam melakukan demikian, HMT menjelaskan lagi asas alasannya. Untuk mengatakan bahawa terdapat alasan yang tidak mencukupi dalam alasan penghakiman HMT adalah tidak wajar (lihat perenggan 37 & 40).

(2) AZB telah menyampaikan kepentingan benefisial dalam aset kepada pemegang amanah *sukuk*, yang memegangnya dalam amanah untuk pemegang *sukuk*. Oleh itu, pemilik benefisial muktamad aset, termasuk hartanah itu, ialah pemegang *sukuk*. Hanya pemegang *sukuk* yang mempunyai hak untuk menjual hartanah itu di bawah *sukuk*. PIMM mahupun responden keempat tidak mempunyai hak untuk berbuat demikian, dan hartanah itu tidak mungkin telah dijual tanpa kelulusan pemegang *sukuk*. Responden keempat tidak mendalangi penjualan itu dan juga pelupusan hartanah itu tidak dijalankan dengan niat untuk menipu perayu atau pemiutang PIMM. HMT adalah betul dalam menolak dakwaan perayu dan mendapati hakikat bahawa penjualan itu dikawal oleh, antara lain, Malaysian Trustees Bhd kerana hartanah itu berada di bawah *sukuk*. Mengenai dakwaan konspirasi untuk menipu dan penipuan oleh responden keempat, perayu gagal membuktikan tindakan yang disengajakan oleh semua responden untuk melucutkan perayu daripada jumlah di bawah penghakiman persetujuan itu. Kegagalan perayu untuk memplidkan sebarang perjanjian mahupun butiran perjanjian dan kegagalan untuk memplidkan dengan jelas perbuatan yang didakwa bagi setiap responden dalam melakukan konspirasi yang didakwa menurut perjanjian mereka terbukti fatal kepada dakwaan tersenut. Tambahan pula, pengakuan SP3 bahawa tindakan penipuan yang didakwa itu tidak berlaku telah merobohkan sepenuhnya tuntutan penipuan perayu. Dengan pengakuan SP3 sedemikian, unsur konspirasi untuk menipu dan/atau tindakan penipuan oleh responden keempat, juga tidak berjaya. Oleh itu, berdasarkan keterangan SP3, kes perayu di bawah s 304 AS gagal seperti yang betul diputuskan oleh HMT (lihat perenggan 55–58, 61, 63 & 67).

(3) Berhubung dengan dakwaan perayu bahawa PIMM tidak pernah mengiktiraf hutang itu di bawah penghakiman persetujuan dalam

penyata kewangannya, ketakdedahan penghakiman persetujuan itu tidak dalam apa-apa cara melucutkan perayu daripada haknya untuk menuntut jumlah penghakimannya dan juga tidak menunjukkan sebarang inferens untuk menipu perayu. Tiada bukti mengenai tindakan ketidakjujuran di pihak pengarah PIMM dan responden keempat berdasarkan alasan berikut: (a) hasil daripada pelupusan hartanah pada 2007 bukan milik PIMM dan oleh itu, PIMM tidak mendahulukan hasil daripada pelupusan hartanah pada 2007 kepada responden keempat dan anak syarikatnya yang lain; (b) penepian hutang yang diketepikan, yang merupakan sebahagian daripada proses penyelesaian dalaman, kelihatan tidak dapat membayar dan penepian hutang adalah perkara biasa, terutamanya antara syarikat induk dan anak syarikat mereka dan antara anak syarikat sesama dan syarikat berkaitan; dan (c) tiada bukti yang meyakinkan untuk menyokong kesimpulan SP2 bahawa responden pertama kepada responden ketiga, termasuk responden keempat, mempunyai dan dengan tidak jujur dengan niat untuk menipu atau bertindak untuk tujuan penipuan (lihat perenggan 72 & 87).

(4) Keterangan tidak menyokong dakwaan perayu bahawa responden keempat adalah pengarah bayangan PIMM. Perayu gagal membuktikan bahawa pengarah PIMM ketika itu pada 2007 terbiasa bertindak selaras dengan perintah atau arahan responden keempat apabila menjual hartanah itu. Dakwaan perayu bahawa responden keempat adalah 'pengarah bayangan' adalah tidak berasas, salah faham, salah tempat, tanpa sebarang asas dan berdasarkan andaian dan deduksi yang salah. Tanpa keterangan konspirasi yang dibuktikan oleh perayu, tuntutan penipuan perayu secara automatik gagal. Oleh itu, HMT tidak melakukan sebarang kesilapan dalam mendapati bahawa perayu gagal atas imbangan kebarangkalian untuk membuktikan bahawa responden telah bertindak dengan tidak jujur atau melakukan tindakan konspirasi untuk menipu perayu (lihat perenggan 89 & 91–93).]

**Cases referred to**

*Antonio Dias Caldeira v Frederick Augustus Gray* [1936] 1 MLJ 110, PC (refd)

*Central Broadcasting Services Ltd and another v Attorney General of Trinidad and Tobago* [2018] UKPC 6, PC (refd)

*Collector of Land Revenue v Alagappa Chettiar; Collector of Land Revenue v Ong Thye Eng and Cross Appeals* [1971] 1 MLJ 43, PC (refd)

*Dato' Prem Krishna Sahgal v Muniandy a/l Nadasan & Ors* [2018] 2 MLJ 693, FC (refd)

*Datuk Hj Ishak bin Ismail v Kenanga Investment Bank Bhd & Ors* [2012] 7 MLJ 840, HC (refd)

*Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 281; [2018] 3 CLJ 427, FC (folld)

*Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)
*Formis Resources Bhd & Ors v Risk Management and Safety System Pty Ltd & Ors and other appeals* [2016] 6 MLJ 73; [2016] 9 CLJ 169, CA (folld)
*Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
*KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627, SC (refd)
*Lai Fee & Anor v Wong Yu Vee & Ors* [2023] 3 MLJ 503, FC (refd)
*M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371, SC (refd)
*Muniandy a/l Nadasan & Ors v Dato' Prem Krishna Sahgal & Ors* [2016] 11 MLJ 38; [2014] 1 LNS 640, HC (refd)
*Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1, FC (refd)
*Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd* [1984] 1 MLJ 286, FC (refd)
*Tan Ah Tong v Gee Boon Kee & Ors* [2006] 2 MLJ 618, CA (refd)
*UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2010] 9 CLJ 785, FC (refd)

**Legislation referred to**

Companies Act 2016 s 540
Companies Act 1965 (repealed by the Companies Act 2016) ss 4(1), 304, 304(1), (5)
Limitation Act 1953

**Appeal from:** *Universal Health Care (R&D) Sdn Bhd (formerly known as SSI Health Care Sdn Bhd) v Ramli bin Md Saleh & Ors* [2023] MLJU 1783 (High Court, Kuala Lumpur)

*Ambiga Sreenevasan (with Ranjit Singh, Shireen Selvaratnam and Gokul Radhakrishnan) (Sreenevasan) for the appellant.*
*Chandrasekar a/l K Kandasamy (with Chew Yi Ting) (Chandrasekar & Assoc) for the fourth respondent.*

**Mariana Yahya JCA:**

INTRODUCTION

**[1]** This is an appeal by the appellant against the High Court's decision dated 6 March 2020. This appeal is only concerned with the appellant and the fourth respondent (the fourth defendant at the High Court).

**[2]** The appellant's claim is against the first to the third respondents, the former directors of Pandan Indah Medical Management Sdn Bhd ('PIMM')

and Talam Transform Bhd ('TALAM') ('the fourth respondent'), to recover the sums due under the consent judgment dated 16 November 2009 against the first to third respondents by making them personally liable for the debt, pursuant to s 304 of the Companies Act 1965 ('the CA 1965') and under the tort of conspiracy to defraud. PIMM was a wholly owned subsidiary of TALAM and as at 12 October 2015, the amount owing under the consent judgment was RM49,233,505.15.

**[3]** On 27 May 2024, this court, after having considered the oral and written submissions of the counsels for the respective parties, unanimously dismissed the appellant's appeal and affirmed the High Court's order dated 6 March 2020. The reasons for the decision are set out as below.

BACKGROUND FACTS

**[4]** The appellant is a company incorporated in Malaysia and brings this action (KL Civil Suit 22 NCC-327–10 of 2018) (MTKL Suit 10) as a creditor of PPIM.

**[5]** The first to third respondents were directors of PIMM.

**[6]** The fourth respondent (TALAM) wholly owned all the share capital of PIMM. Hence, PIMM was a wholly owned subsidiary of the fourth respondent.

**[7]** There were four respondents (defendants) at the High Court. Writ summons and statement of claim have been served to all respondents. No appearance filed by first, second and third respondents. The fourth respondent filed its defence and counterclaim. Whereas, the third respondent appeared as a subpoenaed witness for the plaintiff. The trial with witnesses was between the appellant and the fourth respondent (TALAM) only.

**[8]** On or around 16 June 2000, the appellant entered into a tenancy agreement ('tenancy agreement') as a tenant with PIMM as the landlord for the rental of a property known as the Talam Medical Centre in Selangor ('the property'). The tenancy agreement dated 16 June 2000 between the plaintiff and PIMM on a three storey hospital office building and three storey medical offices block known as the Talam Medical Centre in Selangor constructed on a piece of land held under PM1038, Lot 2374, Mukim Empangan, District Ulu Langat, State of Selangor ('the land'). The appellant was to operate a budget hospital on the property to be called Talam Medical Centre ('TMC').

**[9]** In September 2001, PIMM terminated the tenancy as the appellant failed to increase its paid-up capital to RM3m and to furnish a further advance

payment of three months' rental by way of a bank guarantee. Apart from the deposits paid by the appellant totalling RM821,145, no rentals were paid by the appellant during its occupancy of the property from June 2001 to June 2002. At the time the tenancy agreement was entered and later terminated, PIMM was listed as a subsidiary of the fourth respondent. The appellant only vacated the property in June 2002. This is clearly shown in the PIMM's financial year end ('FYE') 31 January 2002, where the revenue for that period disclosed zero revenue.

**[10]** On 26 November 2001, the fourth respondent announced to Bursa Malaysia that the tenancy agreement had been terminated. On 7 June 2002, the fourth respondent made an announcement to Bursa Malaysia on the entering of a new tenancy agreement with Carta Ambang Sdn Bhd.

**[11]** On 4 January 2005, the Securities Commission ('SC') approved the fourth respondent's proposal to raise funds via issuance of *sukuk ijarah* of RM150m ('sukuk').

**[12]** PIMM's financial statements for the year ending 31 January 2005 state that on 28 January 2005, certain subsidiaries of TALAM (namely Abra Development Sdn Bhd ('Abra'), Inti Johan Sdn Bhd ('Inti Johan'), and PIMM with one other company (ie Intelbest Sdn Bhd) ('sellers'), entered into a series of agreements with Ample Zone Bhd ('AZB'), who will implement the *sukuk* ie structured asset securitisation programme. Ample Zone will purchase various assets from the sellers and to finance the acquisition by the *sukuk* issuance of RM150m, the sellers will enter into an *ijarah* rental agreement ('IRA') with AZB whereby the sellers shall lease the relevant assets back from AZB for a fixed leased term and periodic rental payments.

**[13]** PIMM's property was described as being pledged or charged for the *sukuk* arrangement. As such, PIMM's property continued to be included as an investment property in its financial statements as PIMM's non-current assets until the property was sold.

**[14]** On or around 19 April 2007, PIMM had entered into a sale and purchase agreement with Hospital Pantai Indah Sdn Bhd ('HPISB') to dispose of the land together with the property to HPISB for a consideration sum of RM63.5m (said sale and purchase agreement).

**[15]** On various dates, PIMM's audited financial statements showed that substantial loans were given by PIMM to TALAM and related companies, representing advances and payments made on behalf of them ('loans'). These loans were described in the financial statements of PIMM as '... advances which are unsecured, interest-free and have no fixed terms of repayment'.

**[16]** Notwithstanding fourth respondent's dire financial position during this time (ie, it was commercially insolvent and an affected issuer under PN 17 between 1 September 2006 and 10 June 2010), there was no allowance made for doubtful debts by PIMM in respect of these loans as the directors of PIMM were confident that the regularisation plan by fourth respondent would be approved, which would enable fourth respondent to settle the amount owing to PIMM. Subsequently, PIMM had ceased its operations sometime during the financial year ending 31 January 2009.

**[17]** Due to a dispute that arose between the appellant and PIMM in relation to, inter alia, the tenancy agreement, the appellant on or around 17 June 2002 issued proceedings against PIMM vide the High Court of Malaya at Shah Alam Civil Suit No MT3–22–421–2002 ('Suit 421') for wrongful termination of the tenancy. In its statement of claim, the appellant specified its alleged losses resulting from the termination, claiming, inter alia, the following from PIMM:

(a) the security and earnest deposits of RM821,145;

(b) special damages of RM10,791,077.24;

(c) exemplary damages;

(d) general damages to be assessed;

(e) equitable damages to be assessed; and

(f) interest at 8%pa from the date of the writ of summons to the date of full realisation.

**[18]** PIMM counterclaimed for, inter alia, damages amounting to RM9,295,361.40 with interest thereon at 8%pa from the date of the writ of summons until the date of full realisation.

**[19]** The appellant contends that from the filing of the Civil Suit 421, the appellant was a contingent or prospective creditor for the amounts claimed for in the civil suit. Further, the appellant remained a dormant company from 2003 and thereafter, as reported by its directors' yearly reports.

**[20]** For the reason best known to the appellant and PIMM, on 16 January 2009, the appellant and PIMM entered a consent judgment whereby the appellant's claim was allowed and PIMM agreed to pay the appellant as follows;

(a) the security and earnest deposits of RM821,145;

(b) general damages to be assessed for breach of the tenancy agreement;

(c) equitable damages to be assessed;

(d) interest of 8%pa on such damages from the date of the writ of summons to the date of full realisation; and

(e) costs to be agreed or assessed.

**[21]** PIMM had ceased its operations sometime during the financial year ending 31 January 2009. On 31 October 2012, the fourth respondent disposed of its entire investment in PIMM, consisting of 207,800 ordinary shares of RM1 each and 213,300 5% cumulative redeemable preference shares, for a total consideration of RM2 to a company known as Plenitude Silver Sdn Bhd ('PSSB'). Accordingly, PIMM and its wholly owned subsidiary, Talam Medical Centre Sdn Bhd, ceased to be subsidiaries of the fourth respondent.

**[22]** On 29 May 2014, PIMM was wound up by the court and the Director General of Insolvency Malaysia was appointed as its liquidator.

**[23]** The appellant contended that the consent judgment was entered by fraud. The consent judgment was entered by PIMM when PIMM was not in a financial position to honour any part of the consent judgment, and the PIMM directors, including the fourth respondent, knew of this fact.

**[24]** Further, the appellant alleged that the then directors of PIMM, including the fourth respondent, entered into the consent judgment with no intention of honouring the consent judgment or any part of it.

**[25]** Almost five years after the consent judgment and about five months after PIMM was wound up, the appellant on 13 October 2014 applied for an assessment of damages pursuant to the consent judgment.

**[26]** Last but not least, on 27 April 2015, the High Court assessed damages as follows;

(a) RM23,824,939.51 to be paid by PIMM to the appellant;

(b) interest at the rate of 8%pa on the said sum from the date of the writ of summons until the date of full settlement; and

(c) costs of RM4,000 to be paid by PIMM to the appellant.

As of 12 October 2015, the amount owed by PIMM to the appellant was RM49,233,505.15.

**[27]** It is the appellant's pleaded case that the fraud was orchestrated by the fourth respondent to benefit itself with the connivance of the first, second and/or third respondents. The appellant's claim against all respondents is based

on fraud and conspiracy to defraud PIMM's creditors, including the appellant.

**[28]** In the amended statement of claim, at para 74, the appellant sought the following reliefs:

(a) a declaration that the fourth respondent (TALAM) is a director of PIMM within the context of s 4(1) of the Companies Act 1965;

(b) a declaration that the business of PIMM was carried by the first to fourth respondents with intent to defraud the creditors of PIMM, including the appellant, for a fraudulent purpose pursuant to s 304 of the CA 1965;

(c) a declaration that the first, second and/or third respondents are personally liable to the appellant;

(d) consequently, an order that all the respondents are jointly and/or severally do pay the outstanding debt due and owing to the appellant in the sum of RM49,233,505.15 (as of 12 October 2015);

(e) interest at the rate of 5%pa from the date of judgment to the date of final settlement;

(f) alternatively, damages to be assessed;

(g) further reliefs as the court deems fit; and

(h) costs.

**[29]** It is pertinent to note that the claim is against the directors of PIMM, including the fourth respondent, for fraudulent trading under s 304 of the CA 1965 (currently found in s 540 of the CA 2016), for conspiracy to defraud and fraud, justifying lifting the corporate veil. The Appellant has taken a position that since PIMM was the fourth respondent's wholly owned subsidiary, the fourth respondent had the power to and exercised absolute control overall PIMM affairs, including but not limited to its financial affairs.

**[30]** The appellant further contended that as a shadow director, the fourth respondent sold off the hospital for RM63.5m and moved those monies out of PIMM to avoid the appellant's claim against PIMM and/or to bail out the fourth respondent from its financial difficulties at the material time.

**[31]** The High Court on 6 March 2020 had dismissed the appellant's claim on the ground that the appellant, on the balance of probabilities, had failed to prove their claim under s 304 of the CA 1965 and torts of conspiracy to defraud against all the respondents. Aside from that, the learned High Court judge also dismissed the respondents' counterclaim.

**[32]** Dissatisfied with the decision, the appellant filed this appeal.

OUR DECISION

*Preliminary issue*

**[33]** The appellant has raised a preliminary issue in respect of the grounds of judgment issued by the learned High Court judge ('learned HCJ') as follows:

(a) a three and a half year delay in issuing the grounds of judgment after the decision was given and it was released one day before the learned judge retired from the judiciary; and

(b) an inadequacy of reasons put forth by the learned judge in relation to material issues.

**[34]** Based on these two grounds, the appellant contended that there was no appreciation of the entire body of evidence by the learned judge, in particular, the appellant's various written and oral submissions. Hence, the appellant submitted that the appeal should be allowed and this matter should be remitted to the High Court for a retrial.

**[35]** With respect, we disagree with the contentions of the learned counsel for the appellant's submission that the alleged delay in issuing the grounds of judgment has resulted in the entire grounds of judgment being without and/or, adequate reasons and therefore should be disregarded by this court and allowed the appellant's appeal.

**[36]** We are guided by the Federal Court decision in *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 281; [2018] 3 CLJ 427, the Federal Court was dealing with a non-speaking judgment of the High Court. However, the Federal Court did not order a retrial. Instead, the Federal Court agreed with the Court of Appeal, which held that no law can allow an appeal simply because the judgment was a non-speaking judgment, and the appellate court would have to sieve through the appeal records to see if they are sufficiently supportive of the decision or otherwise. The Federal Court held:

> [37] The importance of a speaking judgment cannot be over-stressed (see *EG Balasingham v Public Prosecutor* [1959] 1 MLJ 193 and *Ganapathy a/l Rengasamy v Public Prosecutor* [1998] 2 MLJ 577). In the instant case, the issue of the non-speaking judgment by the learned JC was addressed by the Court of Appeal in the following manner:
>
> > We agree with learned counsel for the defendants that the judgment of the learned JC was indeed a non-speaking judgment. However, *there is no law that can allow an appeal simply because the judgment of the lower court was a non-speaking judgment.* No doubt we do not condone such practice by the learned JC. *We take the view that it is the duty of a trial judge to state clearly in her*

A *judgment the facts of the case as adduced by evidence, the legal issues requiring determination as well as the application of the laws to the facts and how the learned trial judge reached a conclusion on the findings of fact and law. Then it is for the appellate court to determine whether or not the learned trial judge had committed any error in the findings and application of laws to those facts.*

B *The failure of the trial judge to carefully state her reasons and findings would create enormous difficulties at the appellate stage. It would entail the appellate court to sieve through the appeal records and peruse the notes to see if there are sufficiently supportive of the decision and findings of the trial judge or otherwise. Indeed, the appellate court would not simply interfere with those findings unless they are*
C *erroneous.*

Upon our perusal of the appeal records before us, we agree with the findings of the learned JC and her award of damages for the reasons we elaborate below.

[38] *We endorse the view of the Court of Appeal quoted above*, and agree that the High
D Court judgment in the instant case was a non-speaking one. *Nevertheless, as will be elaborated below, it does not follow that a retrial or a rehearing should be ordered*. (Emphasis added.)

**[37]** We agree with learned counsel for the appellant that there was a delay in
E issuing the grounds of judgment from the learned HCJ. However, this was not the sole ground for this court to disregard the entire judgment and order for retrial. As an appellate court, it is this court's purview to assess the evidence and determine whether it supports the trial judge's decision and to find whether the learned HCJ was plainly wrong in her decision (see: *Tan Ah Tong v Gee Boon*
F *Kee & Ors* [2006] 2 MLJ 618).

**[38]** The learned counsel for the appellant in his submission submitted that the learned HCJ failed to address every single issue raised by the appellant in the submission, and therefore, there was a lack of reasoning by the learned
G HCJ. In our considered view, it is trite that a judge in giving her reasons does not have to address every argument presented by counsel so long as she identifies the issues, the resolution of which are vital for her conclusion, and explains the manner in which she resolved them (see *Central Broadcasting Services Ltd and another v Attorney General of Trinidad and Tobago* [2018]
H UKPC 6).

**[39]** It is our considered view that what would be of utmost necessity will be the issues to be tried between the appellant and the fourth respondent at the High Court. We note that both parties have agreed that the issues to be tried
I and determined by the learned HCJ are as follows:

(a) shadow director:
whether the fourth respondent is a shadow director of PIMM;

(b) lifting the corporate veil:

whether the corporate veil of PIMM ought to be lifted to enable the appellant to visit liability directly on the fourth respondent;

(c) s 304 of the CA 1965:
whether the business of PIMM was carried on by the fourth respondent and if so, with intent to defraud the creditors of PIMM, including the appellant or for any fraudulent purpose pursuant to s 304 of the CA 1965. If so, whether the fourth respondent is liable to the appellant for any sums claimed. Lastly, whether the appellant can bring an action against the fourth respondent under s 304;

(d) conspiracy to defraud:
whether the fourth respondent and/or first to third respondents were wrongful, by unlawful means and with intent to injure, conspired and combined together to defraud PIMM's creditors including the appellant. If so, whether the fourth respondent is liable to the appellant for any sums; and

(e) time-barred and/or abuse of process:
whether the appellant is time-barred/defeated based on:

(i) delay/laches;

(ii) the Limitation Act 1953;

(iii) estoppel and/or res judicata, waiver and/or election; and

(iv) abuse of process.

**[40]** After having perused the learned HCJ's grounds of judgment, we find that the learned HCJ has identified the material issues raised by the appellant and the main issues determinative of the case. In doing so, the learned HCJ further explained the basis of her reasoning. It is now for this court to determine whether the learned HCJ was plainly wrong in fact and law in arriving at her decision. To say that there were insufficient grounds in the learned HCJ's grounds of judgment, in our view, is misplaced.

*Principles of appellate intervention*

**[41]** The law is settled that an appellate court ought not to intervene with the trial court's conclusion on primary facts unless it is satisfied the trial judge was plainly wrong. Based on this 'plainly wrong test', an appellate court is entitled to examine the process of evaluation of evidence by the trial court and may set aside any decision of the trial court with no or insufficient judicial appreciation of the evidence: see the Federal Court decisions in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309; *UEM Group Bhd (previously known as United Engineers (M) Bhd v Genisys Integrated Engineers Pte Ltd & Anor* [2018] supp MLJ 363; [2010] 9 CLJ 785;

*Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453; *Ng Hoo Kui & Anor v Wendy Tan Lee Peng (administratrix for the estate of Tan Ewe Kwang, deceased) & Ors* [2020] 12 MLJ 67; [2020] 10 CLJ 1.

**[42]** Guided by the aforementioned cases, was the learned HCJ plainly wrong in her findings of fact or was there any insufficient judicial appreciation of evidence that the learned HCJ failed to consider, warranting our appellate intervention?

**[43]** Before we proceed further, we would like to revisit the consent judgment entered into between the appellant and PIMM on 16 January 2009 and the filing of an application for assessment of the general and equitable damages on 13 October 2014. It is to be noted that the appellant took four years and ten months to have the assessment heard by the court, where the court delivered its decision on 27 April 2015. Without taking any further action to execute the consent judgment or the assessment order, in October 2015, ie, after a lapse of six months from 27 April 2015, the appellant on 16 October 2015 filed Suit 421 claiming that PIMM could never have paid because the fourth respondent and the three other respondents had conspired and disposed the property and hived-off the proceeds between the years 2007–2010. The appellant never raised any such allegation during the period 2007–2010, but only raised it for the first time at the end of the year 2015, after a lapse of six years from the consent judgment was recorded.

**[44]** Further, PIMM was wound up in 2014 and the non-payment issue was never raised by the appellant. In fact, the appellant filed its proof of debt against PIMM on or around 6 October 2015. By then, PIMM was wound up and it was almost two years after the fourth respondent had disposed of its shares in PIMM. At best, this subsequent belated claim was filed for a simple reason that PIMM would never have paid the appellant, as PIMM had assigned its 'assets' to the fourth respondent in January 2010. By implicating the fourth respondent as a party that conspired to defraud the appellant after the consent judgment was entered between the appellant and PIMM, it is clear that the appellant's allegations of fraud rest on the presumption that had the appellant executed, PIMM would never have paid the amount claimed.

**[45]** Additionally, it was also not the appellant's case in its pleadings on why the consent judgment was entered into by the parties. Further, it was not disputed that during trial, the appellant's own expert, SP2, conceded that there was no fraud on the part of PIMM and/or the fourth respondent in entering the consent judgment (see para 2 (c), *jawapan bertulis responden ke-4* encl 138 *RR*). From the circumstances of the case, our observation is that the dispute arose when PIMM was wound up in 2014 and the fear of not getting the

amount claimed from PIMM has prompted the appellant to make the fourth respondent liable for the said amount.

*Basis of the appellant's claim*

**[46]** It is trite that parties are bound by their pleadings. We would like to remind ourselves and reiterate that it is the appellant's pleaded case that their claim against the fourth respondent is centred and based on fraudulent trading under s 304 of the CA 1965, for conspiracy to defraud and fraud. We agree with the learned HCJ that the main issue to be determined by the learned HCJ was whether the business of PIMM was carried on by the fourth respondent and if so, whether with intent to defraud the creditors of PIMM (including the appellant) or for any fraudulent purpose pursuant to s 304 of the Companies Act 1965 or whether the respondents committed tort of conspiracy to defraud. Section 304 reads as follows:

> 304 Responsibility for fraudulent trading
>
> (1) If in the course of the winding up of a company or in any proceedings against a company *it appears that any business* of the company has been carried on *with intent to defraud creditors* of the company or creditors of any other person *or for any fraudulent purpose, the Court on the application* of the liquidator or *any creditor or contributory* of the company, may, if it thinks proper so *to do declare that any person who*, was knowingly a party to the carrying on of the business in that manner *shall be* responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

**[47]** Section 304(1) provides an essential element of establishing liability or an offence under s 304(5) of the CA 1965, which is that of an 'intent to defraud'. To establish an intent to defraud creditors, the element of 'dishonesty' is an essential element of the statutory provision. Dishonesty is a question of fact which has to be ascertained from a consideration of the entirety of the relevant circumstances (see: *Dato' Prem Krishna Sahgal v Muniandy a/l Nadasan & Ors* [2018] 2 MLJ 693 (FC)).

**[48]** Further, in *Formis Resources Bhd & Ors v Risk Management and Safety System Pty Ltd & Ors and other appeals* [2016] 6 MLJ 73; [2016] 9 CLJ 169, at para 51 of the said judgment, the Court of Appeal shared the same view and held that whether fraud exists is a question of fact. It must be actual fraud that is dishonesty of some sort. It implies a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled to.

**[49]** As for the tort of conspiracy, it is settled law that it requires:

(a) an agreement between two or more persons;

(b) an agreement for the purpose (sole or dominant) of injuring the plaintiff;

(c) that acts done in execution of that agreement resulted in damage to the plaintiff; and

(d) that damage has to be specifically pleaded (see: *Muniandy a/l Nadasan & Ors v Dato' Prem Krishna Sahgal & Ors* [2016] 11 MLJ 38; [2014] 1 LNS 640 (HC) at para 183).

**[50]** The burden of proof for an act to conspire to defraud and fraud on the appellant lies with the appellant and not the fourth respondent. We adopt the same principle as decided in the *Formis* case, and it was held:

> [31] We do well in reminding ourselves that at all times, *the burden of proof lies with the plaintiff*. The plaintiff has to establish its case on a civil burden of probabilities and with the recent decision of the Federal Court in *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 7 CLJ 584; [2015] 5 AMR 497, that includes where the cause of action is fraud. (Emphasis added.)

**[51]** The Federal Court in its recent decision in *Lai Fee & Anor v Wong Yu Vee & Ors* [2023] 3 MLJ 503 reiterated that the burden of proof lies squarely on the plaintiff.

*Whether liability for fraudulent trading to defraud the appellant by the fourth respondent has been established under s 304 of the CA 1965*

**[52]** The appellant sought a declaration that the business of PIMM was carried on by the first, second, third and fourth respondents with intent to defraud the creditors of PIMM, including the plaintiff or for a fraudulent purpose pursuant to s 304 of the Companies Act 1965.

**[53]** The appellant claims that the fourth respondent sold the property using PIMM as a facade and hived off the sale proceeds to itself, thereby depriving PIMM's creditors of any available funds arising from the sale. The appellant also contended that:

(a) the fourth respondent, being the sole shareholder of PIMM at the material time, had the power to and did exercise absolute control over all the affairs of PIMM, including but not limited to its financial affairs;

(b) the directors during this period were mere puppets of the fourth respondent;

(c) in effect, the fourth respondent was a shadow director of PIMM as envisaged in s 4(1) of the Companies Act 1965;

(d) as shadow directors, the fourth respondent sold off the hospital for RM63.5m and moved those monies out of PIMM to avoid the

appellant's claim against PIMM and/or to bail out the fourth respondent from its financial difficulties at that time;

(e) consequently, the fourth respondent, as a shadow director, conspired with the directors of PIMM to avoid payment to the appellant;

(f) therefore, the fourth respondent ought to be liable for PIMM's debts owed to the appellant under s 304 of the CA 1965, as the disposal of the hospital was a business of PIMM which was carried out with intent to defraud the appellant as creditor of PIMM or for a fraudulent purpose; and

(g) the first to third respondents (or any two or more of them together) wrongfully, by unlawful means and with the intent to injure, conspired and combined together to defraud PIMM's creditors (including the appellant).

**[54]** The appellant emphasised that the fourth respondent was able to carry out the fraud as it exercised absolute control over all the affairs of PIMM and was a 'shadow director' within the context of s 4(1) of the CA 1965.

**[55]** We find that the evidence before the learned HCJ shows otherwise. The evidence revealed that AZB had conveyed the beneficial interest in the assets to the *sukuk* trustee, who held it in trust for the *sukuk holders*. Therefore, the ultimate beneficial owners of the assets, including the property, were the *sukuk holders*. The *sukuk holders*' EGM was held on 8 January 2006 and two important matters that emanate from the EGM on 8 November 2006 are as follows:

(a) firstly, pursuant to extraordinary resolution 1, the *sukuk holders* resolved that the assets (ie, all four properties under the *sukuk*) be pre-sold; and

(b) secondly, the sale proceeds from the assets will waterfall accordingly and be distributed proportionately/pro-rated in accordance with the pro-rated classes A, B and C ('partial redemption of the *sukuk*').

**[56]** The above EGM minutes clearly show that neither PIMM nor the fourth respondent was involved in the decision on the pre-sale of the assets and ultimately had no say whatsoever on the decision to pre-sell nor the application of the sale proceeds. In short, only the *sukuk holders* had the right to sell the property under the *sukuk*. Neither PIMM nor the fourth respondent had the right to do so, and the property could not have been sold without the *sukuk holders*' approval. SP1 in his evidence also confirmed and agreed that the *sukuk holders* unanimously approved the sale of the assets.

**[57]** The learned HCJ heard the entire evidence and mechanics on the sale of the property commencing from the EGM, Securities Commission ('SC')

approval and actual utilisation of the sale proceeds and found no fraud in it. Based on the evidence before the learned HCJ, it is our considered view that the fourth respondent did not orchestrate the sale and neither was the disposal of the property carried out with intent to defraud the appellant or PIMM's creditors.

**[58]** In the circumstances, we find that the learned HCJ was right in rejecting the appellant's aforesaid allegations and found for a fact that the sale was controlled by, inter alia, Malaysian Trustees Bhd as the property was under the *sukuk*.

**[59]** The fourth respondent and its related companies did not receive money as advances from PIMM because the sale proceeds were applied by the facility agent for the redemption of the *sukuk* as approved by the Securities Commission and the *sukuk* trustee. Under the supplemental trust deed dated 12 September 2007 between AZB and the *sukuk* trustee, the application of the sale proceeds was determined solely by the facility agent and not PIMM. The accounting entries are made to reflect the default descriptions in PIMM's financial statements to merely record the application of the sale proceeds by the facility agent pursuant to the terms of the *sukuk*. PIMM was not in any position to make any advance of the sale proceeds.

**[60]** As there was no surplus from the disposal of the property after the redemption payments to *sukuk* holders, there were no proceeds available to PIMM, and for PIMM to advance to the fourth respondent and/or its subsidiaries. This evidence clearly showed that the proceeds from the disposal of the property in 2007 did not belong to PIMM. The learned HCJ was right in rejecting the appellant's allegation on the ownership and control over the property, including the proceeds of sale and advance from PIMM to the fourth respondent.

**[61]** Coming back to the allegations of conspiracy to defraud and fraud by the fourth respondent, there is without doubt that the alleged fraud involves the two separate legal entities of PPIM and the fourth respondent and several directors. Obviously, if it were true, all the directors and entities must together have in place:

(a) an agreement between themselves to perpetrate the fraud; and

(b) the roles to be carried out by each of them to achieve that particular fraud.

Otherwise, a fraud of the nature alleged here simply cannot be carried out because of the number of parties allegedly involved.

**[62]** It is also pertinent to note that both PIMM and fourth respondent underwent continuous change of directors from 2005 onwards and the appellant ought to have adduced evidence that the state of mind of the directors of these two companies were to defraud the appellant's creditors throughout the relevant period but failed to do so because the appellant had also pleaded an alleged conspiracy between all the respondents to defraud the appellant.

**[63]** Applying the principle in the *Formis* case, the appellant must prove a wilful act by all the respondents to deprive the appellant of the amount under the consent judgment, but the appellant failed to do so.

**[64]** From the pleadings and evidence before the learned HCJ, we find that the appellant has failed to observe these material facts as follows:

(a) to plead precisely the respondents' objects and means of the alleged conspiracy to injure;

(b) to plead precisely the agreement between the respondents to defraud PIMM's creditors;

(c) to plead precisely the overt acts which are alleged to have been done by each of the respondents; and

(d) to plead precisely that the overt acts done resulted in damage to PIMM's creditors, particularly the appellant.

The failure of the appellant to plead any agreement nor the particulars of the agreement and failure to plead with clarity of the alleged over acts of each of the respondents in committing the alleged conspiracy in pursuance of their agreement proves fatal to the said allegation (see *Datuk Hj Ishak bin Ismail v Kenanga Investment Bank Bhd & Ors* [2012] 7 MLJ 840).

**[65]** The evidence of SP3 has resulted in the appellant's claim being doomed to fail. SP3, Zulkifli (the third respondent), was a director of PIMM from 24 September 2007 to 19 February 2009. The third respondent was called by the appellant to testify for the appellant at trial. When the appellant elects to call the third respondent as the appellant's witness, he runs the risk that the SP3 witness's evidence becomes the appellant's evidence. This was made clear by the Supreme Court in *M Ratnavale v S Lourdenadin* [1988] 2 MLJ 371 at pp 379–380:

> There is no legal prohibition against a plaintiff calling a defendant to be his witness. The position in law is that the matter should be left to the discretion of the trial judge according to the circumstances of the case. As a matter of practice, this is of course seldom done for the simple reason that *when the defendant is called as a plaintiff's witness, his evidence is to be treated as the evidence of the plaintiff. Hence, the plaintiff runs a risk every time he elects to take such a course of action*. (Emphasis added.)

**[66]** At trial, SP3 definitively confirmed and admitted to the court that he as a director of PIMM at the material time, did not carry on the business of PIMM to defraud anyone, that he as a director of PIMM at the time did not carry on the business of PIMM to defraud the appellant, and that the first and second respondents and him did not carry on the business of PIMM with intent to defraud creditors, including the appellant. In fact, SP3 affirmed in his evidence that there was no such conspiracy as alleged.

**[67]** SP3's admission that the defraud act did not occur as alleged has completely demolished the appellant's claim of fraud, a risk that the appellant consciously elected to take. Such an admission of SP3, the element of conspiracy to defraud and/or the fraudulent act by the fourth respondent, also falls. Therefore, in the light of SP3's evidence, the appellant's case under s 304 of the CA 1965 failed as correctly held by the HCJ.

*Entries in PIMM's audited financial statements*

**[68]** The appellant's primary complaint is on the entries in PIMM's audited financial statements ('the said financial statement') and submits that SD2 agreed that accounting entries must be true and PIMM's financial statements treat the property as an asset despite the *sukuk* transaction. But this evidence is only correct from an accounting perspective, not from a legal perspective. The appellant erred by trying to use the accounting entries to establish legal obligations when his questions were based solely on accounting principles.

**[69]** The appellant made several allegations on the PIMM's financial statement and put the first to fourth respondents to strictly prove the truthfulness of the statement. The appellant contended that although the financial statement was prepared by PIMM, confirmed, audited, and approved that the same is true, fair and correct but it does not show the truth of the content of the financial statements, particularly PIMM's liability on the consent judgement with the appellant. It was missing and not mentioned in the financial statement as part of PIMM's liability towards the appellant. Not least, the bad scenario of the financial statement is the waiver or write-off of the debt by PIMM involving PIMM's creditors, which, to the appellant, has no basis neither justification, or consideration to waive or write off the said debt.

**[70]** The non-disclosure of the liability arising from the consent judgment in 2010–2013 in PIMM's audited financial statement has prompted SP2 (Mr Jayasangar a/l Baliah, chartered accountant) to produce a second report, and after perusing SD2's expert opinion, make his findings as follows:

> (i) It is my conclusion and opinion, after an examination of all the documents mentioned in this report and the Plaintiff's 1st Report, having read amongst other

things. PIMM's financial statements and the Statement of Claim, that various Defendants, including TALAM, had acted dishonestly and effectively defrauded and/or deprived UHC of its claim; and

(ii) Having read Brian Wong's report, I am further fortified in my view. It is therefore my position that clearly the various Defendants, including TALAM, intended not to pay UHC the Consent Judgement debt, thereby acted with intent to defraud creditors of PIMM, including UHC or acted for a fraudulent purpose.

**[71]** Based on SP2 second report, SP2 concluded that the first respondent to the third respondent including fourth respondent had acted dishonestly and effectively defrauded and/or deprived the appellant of its claim and intended not to pay the appellant, the consent judgment debt, thereby acted with intent to defraud creditors of PIMM including the appellant.

**[72]** To rebut the appellant's contention that PPIM never recognised the debt under the consent judgment in its financial statements, we are of the view that the non-disclosure of the consent judgment does not in any way deprive the appellant of its rights to claim for its judgment sum and neither does it show any inference of intend to defraud the appellant. Without doubt, both SP1 and SP2 admit this in cross-examination.

**[73]** It is pertinent to note that the allegations made by the appellant are derived from the reading and the interpretation of PIMM's audited financial statement. To justify the allegations and the truth of the said financial statement, both parties called their respective experts ie SP2 for the appellant and SD2 (Brian Wong Wye Pong) for the respondents to explain the facts and the basis of their reports and calculation of the amount claimed on the alleged financial statement (see *KPM Khidmat Sdn Bhd v Tey Kim Suie* [1994] 2 MLJ 627 (SC)).

**[74]** The fourth respondent's expert, SD2, has dealt with the two issues which were brought up in SP2's report, which are:

(a) advances of proceeds from the sale of the property; and

(b) waiver of the waived debts.

**[75]** SD2 had prepared a detailed and comprehensive report on the accounting issues before the court. SD2 has explained his views clearly on the issues stated in his opinion, as reiterated by the learned HCJ in paras 38–46 of Her Ladyship's grounds of judgment.

*Advances of proceeds from the sale of the property*

**[76]** In para 2.0(iv) of the second SP2's report, SP2 claimed that 'as the sale

proceeds were used for the redemption of the *sukuk*, Talam and its related companies would receive the money as advances from PIMM as the sale proceeds belong to PIMM'.

To rebut such a proposition by SP2, SD2 opined that this statement is factually incorrect and further states that fourth respondent and its related companies did not receive money as advances from PIMM because the sale proceeds were applied by the facility agent for the redemption of the *sukuk* as approved by the Securities Commission and *sukuk* trustee.

**[77]** Under the supplemental trust deed dated 12 September 2007 between AZB and the *sukuk* trustee, the application of the sale proceeds was determined solely by the facility agent and not PIMM. The accounting entries are made to reflect the default descriptions in PIMM's financial statements to merely record the application of the sale proceeds by the facility agent pursuant to the terms of the *sukuk*. PIMM was not in any position to make any advance of the sale proceeds.

**[78]** SD2 in his evidence also explained that the said intercompany entries cannot be debts per se because they are not finalised, fluctuating and final amounts would only be seen at the end of the *sukuk* tenure.

Evidently, as there was no surplus from the disposal of the property after the redemption payments to *sukuk* holders, there were no proceeds available to PIMM, and for PIMM to advance to the fourth respondent and/or its subsidiaries.

*Waiver or write of debt*

**[79]** As regards the waiver or write off debt, in para 3.0(iii) of the second SP2's report, SP2 states that 'any internal settlement plan ... must have taken into account existing creditors' of PIMM. SD2 in his evidence disagreed with this statement. SD2 opined that debt settlement arrangements are made based on the discretion of the management and/or directors of the companies involved. It is not necessary for all settlement plans to involve all the creditors of a company. This may be observed by the regularisation plan ('RP') approved by the SC, which only involves the settlement of the financial institution lenders of the Talam Group.

**[80]** According to SD2, PIMM may have taken into account the existing creditors of PIMM when undertaking the internal settlement plan. The waiver of the waived debts involves the settlement of the liabilities owing by PIMM to its creditors. At these material times in January 2007-January 2009, the consent judgment did not exist. Hence, these expressions of 'settle' have nothing to do with the consent judgment, but with the *sukuk* balances which

have been in PIMM's accounts from FYE 2007. And the auditors accepted those expressions of confidence, including the expression on the internal settlement plan.

**[81]** Additionally, SD2 in his report states his findings as follows:

> 5.2 I further noted that there were no similar disclosures in Talam's financial statements in the FYE 31 January 2007, 2008 and 2009 on the settlement of the amounts due to PIMM or the internal settlement plan.
>
> 5.3 As explained in the Section 3 of this Report, the Property was disposed and the proceeds from the disposal of the Property were entirely applied towards the redemption of the *sukuk*. Contrary to Section 6.0 in the Jayasangar Report and the Plaintiff's allegation in the Statement of Claim, *there were no proceeds received by PIMM from the said disposal.*
>
> 5.4 It would be misleading for Jayasangar to state that PIMM had utilised the proceeds to give loans to Talam and its related companies, as well as to reduce its non-current liability due to its related companies. Instead, the *proceeds were paid to the sukuk Trustee on trust for the sukuk holders*. Hence, it is incorrect for Jayasangar to attempt to link the Waived Debts to the disposal of the Property in such a manner.
>
> 5.5 Having perused the director's circular resolution dated 21 January 2010 pertaining of the assignment of debts and waiver of debts by PIMM (See CBD/B-7/pg73–74), *it is noted that the Waived Debts were waived and not written-off as per PIMM'S financial statements for the FYE 31 January 2008* and Section 6.0 of the Jayasangar Report The assignment of debts and Waived Debts were as follows ...
>
> 5.6 I noted that the Waived Debts are mainly in respect of debtor companies which were directly involved in the *sukuk*, ie Talam, I SB, USB and ADSB, which debts assigned to Talam to be waived amounted to RM54,581,478.16, and exceeds the total amount of the Waived Debts of RM52,535,869.11. This means that the remaining debts assigned and waived by PIMM was less than the debt waived in favour of PIMM of RM2,542,371.10 (ie. from companies owed by PIMM).
>
> 5.7 Notwithstanding the above, I note the following:
>
> (a) PIMM was funded almost entirely by Talam and/or the Talam Group, and at the time of the assignment of debts and waiver, was a wholly-owned subsidiary company of the Group.
>
> (b) PIMM had benefitted from the *sukuk*, as part of the proceeds from the issuance of the *sukuk* was applied for the settlement of PIMM's loan from HSBC;
>
> (c) In its financial statements for the FYE 31 January 2007 and 2008, PIMM's directors have expressed their confidence that upon implementation of the Regularisation Plan, Talam would be able to settle all the intercompany debts owing to the Company. This was not similarly expressed by the directors of Talam in Talam's financial statements for the same periods;
>
> (d) In its financial statements for the FYE 31 January 2008, PIMM's directors then made reference to an internal settlement plan among Talam and its

subsidiaries to settle the amount owing to the Company. Hence, *the assignment of debts and waiver of the Waived Debts appear to be part of such internaf settlement plan*;

(e) After the assignment of debts and waiver of the Waived Debts, PIMM's financial statements for the FYE 31 January 2010 to 2012 continued to make reference to a *letter of financial support* by Talam to settle the obligations of PIMM. This would not be unreasonable given that the assignment of debts and waiver of the Waived Debts would have reduced the net assets of the Company by the amount of the Waived Debts; and

(f) It would also be reasonable to expect that Talam would cease to undertake to settle the obligations of PIMM after the disposal of PIMM to Plenitude, given that PIMM had ceased being a subsidiary company of the Talam Group.

5.8 As MSB was the registered owner of the Land and PIMM was merely a lessee, it is not unreasonable to expect that MSB is entitled to a portion of the proceeds from the disposal of the Property, in view of its residual rights to the Land.

*Conclusions/Findings*

5.9 *The assignment of debts and waiver of the Waived Debts appears to be part of the internal settlement plan as disclosed by the directors of PIMM in its financial statements for the FYE 31 January 2009.*

5.10 The internal settlement plan does not seem unreasonable as Talam appeared to have undertaken to settle the obligations of PIMM after the assignment of debts and waiver of the Waived Debts, until the Company was disposed from the Group.

5.11 After the disposal of PIMM, it was reasonable for Talam to cease to undertake to settle the obligations of PIMM, given that PIMM had ceased being a subsidiary company of the Talam Group.

5.12 I would also add that debt waivers are not uncommon, especially between holding companies and their subsidiaries and between fellow subsidiaries and related companies. Such waiver could occur in instances such as to facilitate the winding-up of a subsidiary via members' voluntary winding-up.

5.13 Further, *as MSB was the registered owner of the Land and PIMM was merely a lessee, it is not unreasonable to expect that MSB is entitled to a portion of the proceeds from the disposal of the Property, in view of its residual rights to the Land.* (Emphasis added.)

**[82]** In gist, SD2 concludes that the difference in description between 'waiver' and 'write-off' is irrelevant for the reasons that:

(a) the underlying documents produced resolve the matter with certainty; and

(b) SD2 observed that it is irrelevant whether it is a write-off or a waiver because the net effect is that the amounts are taken off the balance sheet and have no impact on the final accounts.

**[83]** Ultimately, the difference in terminology is also irrelevant because almost 99% of the amounts in the A&W were not debts per se, as they arose from the *sukuk* sale. Further, it is not the appellant's case that the accounts are rendered not 'true and fair' because of the discrepancy in terminology. There is no necessity to call the auditor to explain the discrepancy on such a minor issue, as the same can be resolved by recourse to the directors' circular resolutions referred to above.

**[84]** Based on the above, it is clear that SD2, unlike SP2, has fully comprehended and considered all the relevant transactions and factual matrix surrounding the transactions, including the *sukuk* transactions. As such, SD2's evidence and expert reports would be of great assistance to the learned HCJ in determining whether or not there was any fraud on the part of the fourth respondent and/or first to third respondents respectively.

**[85]** It is settled law that an appellate court should be slow to disturb the findings by the trial judge on expert evidence (see Federal Court and Privy Council decided cases in *Seong Fatt Sawmills Sdn Bhd v Dunlop Malaysia Industries Sdn Bhd* [1984] 1 MLJ 286, *Antonio Dias Caldeira v Frederick Augustus Gray* [1936] 1 MLJ 110, *Collector of Land Revenue v Alagappa Chettiar; Collector of Land Revenue v Ong Thye Eng and Cross Appeals* [1971] 1 MLJ 43).

**[86]** It is apparent that the learned HCJ heard evidence from both experts, weighed each one's opinions and made a reasoned decision. The learned HCJ formed the view that SD2 evidence was credible and reliable so far as material particulars were concerned. The learned HCJ accepted the opinion of SD2 over SP2.

**[87]** Having perused the evidence in its entirety, we agree with the finding of fact by the learned HCJ that there is no proof of the act of dishonesty on the part of PIMM's directors and the fourth respondent based on the following grounds:

(a) the proceeds from the disposal of the property in 2007 did not belong to PIMM and as such, PIMM did not advance the proceeds from the disposal of the property in 2007 to the fourth respondent and its other subsidiaries;

(b) the waiver of the waived debts, which was part of an internal settlement exercise, does not appear to be unable to pay and debt waivers are not uncommon, especially between holding companies and their subsidiaries and between fellow subsidiaries and related companies; and

(c) no cogent evidence to support SP2's conclusion that first respondent to third respondent, including fourth respondent, had and dishonestly with

A intent to defraud or acted for a fraudulent purpose.

*Shadow director*

Whether the fourth respondent is a shadow director of PIMM

B

**[88]** The appellant complained that the learned HCJ failed to decide on the issue of whether the fourth respondent was a shadow director of PIMM. We found that the learned HCJ has identified and dealt with the main thrust of the appellant's claim of fraud under s 304 of the CA 1965 and conspiracy to C defraud. The learned HCJ then made a finding that there is no proof of dishonesty or fraud on the part of the fourth respondent and PIMM. Given this finding, there is no necessity for the learned HCJ to decide on the issue of shadow director and/or lifting the corporate veil.

D **[89]** In any event, the evidence does not support the appellant's allegation that the fourth respondent was the shadow director of PIMM. The appellant failed to establish that the then directors of PIMM in 2007 were accustomed to act in accordance with the directions or instructions of the fourth respondent when selling the property.

E

**[90]** The evidence showed that it is indisputable that at the time of the sale of the property to HPI, the board of directors of PIMM consisted of Ng Lai Tin and Mohd Salleh bin Daud, and not the first, second and third respondents. F The documentary evidence shows that the sale of the property to HPI was approved by Ng Lai Tin and Mohd Salleh bin Daud as directors of PIMM at the material time.

**[91]** Both Ng Lai Tin and Mohd Salleh bin Daud had resigned as directors of G PIMM on 24 September 2007. But the appellant made no effort whatsoever to call them as witnesses at trial. The appellant failed to show any evidence whatsoever that both Ng Lai Tin and Mohd Salleh bin Daud were accustomed to act in accordance with the directions or instructions of the fourth respondent to 'sell' the property or make any other decisions. In such H circumstances, the appellant's allegation that the fourth respondent is the 'shadow director' is baseless, misconceived, misplaced, without any foundation and based on erroneous assumptions and deductions.

I **[92]** We find that the learned HCJ in paras 32–46 of the grounds of judgment has extensively dealt with the issue of the act of dishonesty to defraud the appellant. We agree with the respondent's learned counsel submission that in the absence of evidence of conspiracy proved by the appellant, the appellant's claim of fraud automatically fails, as correctly held by the learned HCJ.

**[93]** The pivotal contention of the appellant that there was dishonest, fraudulent trading is based on the PIMM's accounts produced in court. The acceptance of SD2 over SP2 expert opinion preparation and interpretation of PIMM's account vis a vis accounting standards is a finding of fact that we normally do not intervene unless it has been plainly wrong decided by the learned HCJ. Upon our review, we did not find any error here on the part of the learned HCJ. It is our considered view that the learned HCJ made no error in her findings of fact at para 63 of the grounds of judgment that the appellant failed on balance of probabilities to prove that the respondents had acted dishonestly or committed the act of conspiracy to defraud the appellant.

CONCLUSION

**[94]** Having considered the totality of the evidence before the learned HCJ, we find that the learned HCJ has not erred in fact and law in arriving at her decision in dismissing the appellant's claim. The learned HCJ has analysed all the issues and supported evidence and given her reasons accordingly. The learned HCJ had correctly applied the law to the facts of this case and, in fact, made several critical findings against the appellant. It is our view that it is not a non-speaking judgment.

**[95]** In conclusion, it is our respectful findings that the decision discloses no appealable error. The learned HCJ appreciates the law on s 304 (paras 26 to 30 of judgment) and conspiracy to defraud (para 31 of judgment). We find there is no appealable error in the learned HCJ's decision that warrants our appellate intervention. In the premises, we unanimously dismiss the appeal and affirm the decision of the High Court dated 6 March 2020.

**[96]** We ordered costs of RM50,000 to be paid by the appellant to the fourth respondent, subject to payment of allocator.

*Appeal dismissed.*

Reported by Nabilah Syahida Abdullah Salleh